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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-689

JASPER J. MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No.

JASPER J. MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Jasper J. Mirabile, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming a judgment of the United States District Court for the Western District of Missouri dated October 15, 1974, convicting him of a violation of 18 U.S.C. §1341.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet officially reported, is reported herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 15, 1974. A timely petition for rehearing was denied on November 7, 1974 and is reported herein as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a scheme to defraud the State of Missouri by the submission of false sales tax returns by mail is within the ambit of the Federal Mail Fraud Statute when the State of Missouri has previously enacted criminal sanctions for the underpayment of said tax.

(2) Whether the Mail Fraud Statute applies to this case where the mailings bore no practical or purposive relationship with the scheme to underpay the taxes and were purely incidental and collateral.

(3) Whether the Court below erred in denying petitioner's Motion to Dismiss the Indictment for Selective and Discriminatory Prosecution.

STATEMENT OF THE CASE

Petitioner, Jasper J. Mirabile, was indicted by the Grand Jury of the United States District Court for the Western District of Missouri and charged with mail fraud

in violation of 18 U.S.C. §1341. He was charged with devising a scheme to defraud the State of Missouri by fraudulently understating the Missouri State Sales/Use Tax Returns of Jasper's Italian Restaurant, Inc., of which he is owner and operator, and for the purpose of executing such scheme caused 27 such returns to be mailed to the State of Missouri Department of Revenue.

He was tried before the Honorable Elmo B. Hunter and a jury and found guilty. Judgment was entered on May 3, 1974. He was sentenced to a five-year period of probation.

At trial, it was stipulated that the sales/use tax returns mentioned in the indictment were in fact understated in the amounts alleged and that defendant caused those returns to be mailed to the State of Missouri Revenue Department as alleged in the indictment.

The principal controversies raised regarding the indictment concerned whether the mail fraud statute, 18 U.S.C. §1341, could properly be invoked against the mailing of a tax return to the state revenue department by a citizen of that state, and whether the mailing in question was in furtherance of a scheme to defraud. These issues were raised by petitioner's pretrial motion to dismiss the indictment, and the District Court, in an opinion and order dated January 24, 1974, denied the motion. That decision is reported as *United States v. Mirabile*, 396 F. Supp. 1180 (W.D. Mo. 1974). Petitioner also moved for dismissal on the ground of selective and discriminatory prosecution. This motion also was denied.

REASONS FOR GRANTING THE WRIT

I.

A SCHEME TO DEFRAUD THE STATE OF MISSOURI BY THE SUBMISSION OF FALSE SALES TAX RETURNS BY MAIL IS NOT WITHIN THE AMBIT OF THE FEDERAL MAIL FRAUD STATUTE WHEN THE STATE OF MISSOURI HAS PREVIOUSLY ENACTED CRIMINAL SANCTIONS FOR THE UNDERPAYMENT OF SAID TAX.

Petitioner's prosecution was maintained under the federal mail fraud statute, 18 U.S.C. §1341, which provides in relevant part:

> "Whoever, having devised * * * any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses * * * for the purpose of executing such scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail * * * any * * * matter or thing" * * *.

The application of the mail fraud statute to the facts of this case represents a grave encroachment upon the prerogatives belonging to the criminal processes of the states. As such, it does violence to the sensitive constitutional balance of power between the federal government and the sovereign states.

The mail fraud statute has, with various modifications in language, been in force now for more than a century. Its intent was to *protect* the "Post Office Establishment" from "abuse" by those who would utilize correspondence with the intent to carry out a scheme to defraud. Act of June 8, 1972, 17 Stat. L. 323; later §5480 of the Revised Statutes; see *Stokes* v. *United States*, 157 U.S. 187

(1895). Throughout its history, it has been repeatedly emphasized that Section 1341 is not to be read as reaching all frauds, but is limited to those involving federal injury; where the abuse of the Post Office has been a necessary part of the execution of the fraud; leaving all other cases to be dealt with by appropriate state law. *Kann v. United States*, 323 U.S. 88, 95 (1944); *Parr v. United States*, 363 U.S. 370, 380 (1960); *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1969); *United States v. Maze*, 468 F.2d 529, 536 (6th Cir. 1972), *affirmed*, 94 S.Ct. 645 (1974). The statute, therefore, is aimed solely at the vindication of a distinctly federal interest, the mail system. It was never intended either to infringe upon state law enforcement, or even to be part of a scheme of federal-state cooperation. See *United States v. Sheridan*, 329 U.S. 379, 387 (1946).

In *Kann v. United States, supra*, the Supreme Court said, with regard to state jurisdiction in mail fraud cases:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S. at 95.

The principle that local frauds should be prosecuted by local authorities rather than under the federal mail fraud statute is similarly expressed in *United States v. Kelem, supra*, and *United States v. Chason*, 451 F.2d 301, 204 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1971).

In *Kelm, supra*, at 347, the court said:

> "It is elementary that the jurisdiction of federal courts is defined and limited by the Constitution

> and congressional action; hence, statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248 (1933); Kline v. Burke Constr. Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 67 L.Ed. 226 (1922). Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control, effectively. Indeed as the Supreme Court has emphasized, section 1341 is not designed to reach all frauds 'but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' "

Petitioner submits that it never has been the intent of Congress that the mail fraud statute be extended to situations involving the mailing of tax returns to state revenue departments, particularly so when the State of Missouri had previously enacted criminal sanctions for nonpayment of said taxes. Section 144.080 R.S. Mo.

The relation between federal and state jurisdiction is an extremely sensitive one which requires the continual alertness of the judiciary lest imbalances occur in the constitutional framework of the union. In the case of *Palmer v. Massachusetts*, 308 U.S. 79, 83-84 (1935) Justice Frankfurter said:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have

> one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. *Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.*" [Emphasis supplied]

This Court in *Rewis v. United States*, 401 U.S. 808 (1971), reversing the conviction of two Florida lottery operators of violating 18 U.S.C. §1952 (Travel Act), limited the further extension of federal jurisdiction in such cases:

> "Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." Id. at 811-12.

The desire to preserve this sensitive Federal-State-balance in the field of criminal jurisdiction was emphasized in the Supreme Court's decision of *United States v. Bass*, 434 F. 2d 1296 (2d Cir. 1970), *affirmed*, 404 U.S. 336 (1971). In *Bass*, the Court narrowly read the firearms provision, 18 U.S.C. §1202(a) to require a nexus between possession of a weapon and interstate commerce, rejecting the government's contention that the statute did not require such a showing of an interstate connection:

> "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339.

The Court then reaffirmed in part its decision in *Rewis v. United States, supra*, stating that it would not assume that Congress intended to upset the delicate Federal-State balance unless clearly mandated by that body.

It is obvious that the rationale developed by the Supreme Court in *Rewis* and in *Bass* apply with equal or greater force to this indictment. Similarly, the conduct alleged in the indictment is "readily denounced as criminal by the States." *Bass, supra*, at 349. In view of the intense connection between the alleged acts and the interests of the State of Missouri, the blunt assertion of a minor federal interest would clearly "alter sensitive Federal-State relationships." *Bass, supra*, at 350.

The problems involved in the continual expansion of federal jurisdiction have been examined by Chief Justice Burger. See Burger, *The Courts on Trial*, 22 F.R.D. 71 (1970); *The State of the Judiciary*, 56 ABA Journal 929 (Oct., 1970).

A particularly compelling need, according to the Chief Justice, is to strike a "proper jurisdictional balance" between federal and state court systems whereby the state courts undertake, in appropriate areas, much of the nation's expanding litigation, criminal and civil. See, Burger, *Has the Time Come?*, 55 F.R.D. 119, 120-21.

II.

THE MAIL FRAUD STATUTE DOES NOT APPLY TO THIS CASE WHERE THE MAILINGS BORE NO PRACTICAL OR PURPOSIVE RELATIONSHIP WITH THE SCHEME TO UNDERPAY THE TAXES AND WERE PURELY INCIDENTAL AND COLLATERAL.

Petitioner submits that the mailings involved here were in no sense an integral part of the scheme to underpay the State of Missouri and in no way contributed to its success. Almost thirty years ago Mr. Justice Roberts wrote for the Supreme Court that the mail fraud statute does not apply where the mailing is "merely incidental and collateral to the scheme and not a part of it." *Kann v. United States*, 323 U.S. 88, 95 (1944). Following *Kann*, the federal courts have acknowledged this, holding that for a mailing to be subject to federal prosecution it must be more than "incidental", "collateral" or "tangential" to the fraudulent scheme, *United States v. Chason*, 451 F.2d 301, 303 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1971), but must be significantly related to the success of the scheme "as a matter of practical good sense." *United States v. Brickey*, 296 F.Supp. 742, 748 (E.D. Ark. 1969).

The Supreme Court has twice recently taken the opportunity to underscore its disapproval of convictions based upon mailings which were not for the purpose of executing the scheme, as the statute requires. In *United States v.*

Maze, 94 S.Ct. 645, 651 (1974), Mr. Justice Rehnquist noted in the majority opinion that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the scheme. But it did not do this, instead, it required that the use of the mails be 'for the purpose of executing such a scheme . . .'." What is required, he wrote, is that the mailings be "sufficiently closely related to respondent's scheme so as to bring his conduct within the statute." In *United States v. Miles*, ____ U.S. ____ (March 1974), the court summarily vacated a similar conviction and remanded it to the Eighth Circuit for reconsideration in light of its decision in *Maze*.

Under the facts of this case it is apparent at once that the use of the mail service was utterly tangential to the scheme alleged. Neither facility of execution nor deterrence of detection was in any way promoted by the mailing. The scheme was completely independent of the mode of transmittal to the State of Missouri. For any purpose connected with the scheme, personal delivery would have been no more or less related to the success of the underpayment scheme.[1]

The courts have always scrutinized the use of the mails at issue, recognizing that determining the applicability of Section 1341 "depends upon a careful examination of the evidence in each case to determine the contribution made by mailings to the scheme's success." *United States v. Kelem, supra;* see also, *United States v. Maze*, 468 F.2d 529 (6th Cir. 1972), *affirmed*, 94 S.Ct. 645 (1974). Thus,

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[1] It should be noted that during the relevant period there existed a full functioning office of the Department of Revenue in Kansas City itself. The office was established by statute. Section 32.040 R.S. Mo.

it has found statutory applicability where the use of the mails is a means of concealment enabling further frauds to be perpetrated. *United States v. Hendrickson*, 394 F.2d 807 (6th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969); *United States v. Riedel*, 126 F.2d 81 (7th Cir. 1942); *United States v. Lowe*, 115 F.2d 596, 599 (7th Cir. 1940), *cert. denied*, 311 U.S. 717. So also, where the delays caused by the mails are necessary to the accomplishment of the scheme. See, *e.g.*, *United States v. Kelem, supra; Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968), *cert. denied*, 391 U.S. 964. And, where the mailings were utilized to "lull" the victims and thus enable the perpetrators to escape detection. *United States v. Sampson*, 371 U.S. 75 (1962); *United States v. Edwards*, 458 F.2d 875 (5th Cir. 1972). In the instant case, of course, none of these considerations came into play at all.

The Court's attention is called to the case of *United States v. Flaxman*, 495 F.2d 344 (7th Cir. 1974 (Pet. for Cert. filed in the Oct. Term, 1973)) in which the Seventh Circuit considered a virtually identical mailing and held that it was in furtherance of the scheme to defraud. For the reasons stated herein, petitioner submits that the Seventh Circuit's view is erroneous.

III.

THE COURT BELOW ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT FOR SELECTIVE AND DISCRIMINATORY PROSECUTION.

Petitioner contends that his prosecution is based not upon the legitimate exercise of prosecutorial discretion, but rather upon the singling out of plaintiff for selective and discriminatory prosecution in violation of the First and

Fifth Amendments of the Constitution of the United States. See *United States v. Falk*, 479 F.2d 616, *en banc* (7th Cir. 1973); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

During the indictment period at least several thousand citizens of Missouri underpaid their use/sales taxes, utilizing the mails for transmittal, and yet only petitioner and two other persons of Italian descent were indicted under 18 U.S.C. §1341.[2]

The predicate for discounting the presumptive regularity of this prosection is, of course, contained within the four corners of the indictment itself. Petitioner submits that the application of the mail fraud statute to state tax transactions is at odds with nearly a century's custom, policy and practice on the part of the Department of Justice. With each of the fifty states of the Union deriving most of its revenues by taxation of its citizens and with the reliance upon the postal service as the ordinary method of transacting such business, it is obvious that the class of potential defendants is infinitely greater than the 25,000 cited by *United States v. Falk, supra.* Yet, petitioner's research has revealed only one reported decision, *United States v. Flaxman, supra,* involving such an application of the mail fraud statute. That case and those pending indictments in the Western District of Missouri represent the first such prosecutions in the long history of the mail fraud statute. These considerations, themselves, should suffice to raise a question about the legitimacy of the prosecutorial decision which has resulted in petitioner's indictment. However,

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[2] Those indictments are *United States v. Capra*, 73CR108W-2, 73CR209W-3-2, and *United States v. Brancato*, 73CR233W-2. Defendant Capra is a Kansas City, Mo. Councilman, and Defendant Brancato is a Missouri State Senator from Kansas City.

petitioner contends that two additional factors should be considered on the issue of selective prosecution.

For more than twenty years petitioner has operated a large and successful restaurant business in Kansas City, Mo. and admittedly, during a period prior to the indictment, the Federal Kansas City Strike Force suspected that certain persons involved in otherwise unidentified criminal activities were silent partners in said business.[3] Also the government questioned petitioner's association with people it believed were involved in criminal activity, most of whom were boyhood friends of petitioner.

The petitioner was called to testify before a grand jury concerning some of these matters and attempted to truthfully answer all questions put to him. But when his answers did not support the prosecutor's theory of the case, his wife was called to testify, which caused a violent verbal confrontation between petitioner and the prosecutor herein pertaining to the callous treatment she received in connection with her appearance. Thereafter, petitioner, his family and employees were the subject of an *intensive* investigation conducted by the prosecutor, utilizing the Federal Bureau of Investigation, Internal Revenue Service, Postal Authorities and Immigration Service. When all these agencies failed to find evidence of any federal wrongdoing involving petitioner, the prosecutor turned to this novel use of 18 U.S.C. §1341.

Petitioner's association with third parties, whether intentional or fortuitous, is clearly a right protected by the Constitution. The First Amendment's guarantee of the right

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[3] The government has since conceded that it had not developed any evidence to support this contention.

to peaceably assemble provides plenary freedom for a citizen to associate with those he chooses. If his selection for prosecution stemmed also in part from the prosecutor's belief that petitioner was withholding evidence from the Grand Jury or the FBI, there exist specific criminal sanctions which were adequate to the task. What a prosecutor cannot do is to engage in the fashioning of a dubious legal theory for the purpose of punishing a citizen for the sins of his friends. Nowhere have the courts been quicker to condemn abuse of prosecutorial discretion than where it has operated to abridge protected First Amendment rights. See, *Falk, supra; United States v. Crowthers,* 456 F.2d 1074 (4th Cir. 1972); *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972).

The Court held a pre-trial hearing on petitioner's Motion to Dismiss for Selective Prosecution and the prosecutor took the stand and was questioned concerning the organized crime designation of petitioner. First, the prosecutor acknowledged that petitioner was in fact placed upon an "organized crime" list by government agents whose identity he refused to disclose. He informed the Court that petitioner's identification as an organized crime subject was, in fact, transmitted to the Internal Revenue Service and the Federal Bureau of Investigation, but refused to reveal upon what, if any, evidence petitioner's identification was based.

While the prosecutor naturally denied any participation in a campaign of personal or official harassment of petitioner, he, nonetheless, revealed that as a result of his organized crime identification, his name, along with a number of others, was singled out for special tax investigation. That, in turn, triggered an audit of petitioner by the Internal Revenue agent attached to the prosecutor's staff, which, in turn, led to the inquiry into petitioner's

state sales tax records. All this, in spite of the prosecutor's denial of any personal knowledge that petitioner was in any way connected with organized crime.

When the consequences of such labeling are as far-reaching as a prosecution on theories which are applied to no other citizen, the basis for such stigmatization should not be left to nameless, faceless accusers who can neither be held accountable for their allegations, nor examined on the basis of their accusations. Surely if such characterization is permissible at all it raises elemental issues of due process of law which must be resolved. The due process aspects of such organized crime identification have been the subject of criticism already in the federal courts. See, *Masiello v. Norton*, 364 F. Supp. 1133 (D.C. Conn. 1973).[4] For the anonymous labeling is fraught to a dangerous extent with the possibilities of guilt by association which petitioner firmly believes to underlie his prosecution on this unprecedented charge.

The plaintiff submits that such an expansion of federal jurisdiction without the express or implied approval of Congress should not be permitted until it is reviewed by this Court.

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[4] Masiello, a federal prisoner, petitioned for a writ of habeas corpus, alleging that he was unlawfully denied parole. It was revealed that his application was given less favorable procedural treatment because Masiello bore a special "organized crime" label. He complained that elemental fairness required that he be given an opportunity to rebut the designation. The court, finding that the only basis for the labeling was "loosely-worded, unsupported assertions", granted Masiello "another parole hearing to contest the 'organized crime' label." *Id.* at 1137.

CONCLUSION

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

Respectfully submitted,

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November, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1367

United States of America, Appellee,	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Jasper J. Mirabile, Appellant.	*	

Submitted: September 9, 1974
Filed: October 15, 1974

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The primary focus of this appeal is the federal mail fraud statute, 18 U.S.C. §1341 (1970). Issues have been raised regarding the scope of that statute and its applicability in the context of a state misdemeanor violation, namely, fraudulent misrepresentation of gross sales on sales/use tax returns. In addition, this appeal challenges the trial court's denial of a motion to dismiss on the basis of selective and discriminatory prosecution. We affirm.

Appellant Mirabile, owner and operator of a Kansas City, Missouri restaurant, was indicted by a federal grand jury in 1973. The indictment charged that Mirabile had devised and taken part in a scheme in which the gross retail sales of his restaurant were understated on the monthly sales/use tax returns that he caused to be mailed to the Missouri Department of Revenue. As a result, the state was defrauded of approximately $28,000 over a two and one-half year period. In *United States v. Mirabile*, 369 F. Supp. 1108 (W.D. Mo. 1974), the district court denied a motion to dismiss the indictment and held that federal jurisdiction under §1341 was proper. Subsequently, appellant was found guilty of mail fraud in a jury trial and placed on probation for five years.

The initial contention on appeal is that a scheme to defraud the state of Missouri by submitting false sales/use tax returns by mail is beyond the intended scope of §1341.[1] Appellant urges that the use of the mail fraud statute should be restricted to frauds involving federal injury and abuse of the Postal Service. It is argued that in furtherance

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[1] The statute, 18 U.S.C. §1341 (1970), provides, in relevant part, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * for the purpose of executing such scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any (matter or thing whatever to be sent or delivered by the Postal Service) shall be fined not more than $1,000 or be imprisoned not more than five years, or both.

of the intended purpose of the statute and in the interest of federal-state relations, all other fraud should be left to the states for enforcement. The fact that the statute has never been used in connection with fraudulent tax returns is, according to appellant, evidence of the error in the instant case.

However, the statute on its face is not limited in the manner suggested by the appellant; nor does it exempt the conduct in which appellant engaged. It clearly applies to "*any* scheme or artifice to defraud" in which the jurisdictional means (the mails) are employed. *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973). In the absence of a clear showing of contrary legislative intent, *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974), "the general rule of statutory construction requires the courts to ascertain the intent of legislation from the language used * * * if it is clear and plain and the act is internally cohesive." *Community Blood Bank v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969).

We must interpret the plain language of §1341 "broadly and liberally * * * to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises." *United States v. States, supra* at 764. Such an interpretation is totally consistent with the ever-expanding role the mail fraud statute has played.

The diversity of schemes brought within the purview of §1341 illustrates the expansive reading that is generally given to that statute. *See, e.g., United States v. States, supra* at 764-65; *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *United States v. Edwards*, 458 F.2d 875 (5th Cir.), *cert. denied*, 409

U.S. 1029 (1972); *United States v. Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Rosenblum*, 339 F.2d 473 (2d Cir. 1964). Thus, the contention that §1341 was not meant to cover the fraud in the instant case is not persuasive.[2]

Appellant argues that the application of §1341 in this case is an impermissible intrusion into state affairs. However, the fact that the underlying fraud here may violate state law does not exclude it from the proscription of the mail fraud statute. *Parr v. United States*, 363 U.S. 370, 389 (1960); *United States v. Flaxman*, 495 F.2d 344, 349 (7th Cir. 1974); *United States v. States*, *supra* at 767; *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied*, 409 U.S. 1029 (1972).

Appellant's contention is premised upon a basic misinterpretation of the rationale behind the mail fraud statute. This court recently stated, "[t]he focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails." *United States v. States*, *supra* at 767. In this case, as in *States*, principles of federalism do not provide a basis for reversal.

Appellant also alleges that the mailings in this case were not an integral part of the scheme to defraud and therefore the fraud does not fall within the proscription of the mail fraud statute. We disagree. In *United States v. Nance*, ____ F.2d ____ (8th Cir. 1974), this court

---

[2] We similarly reject appellant's attempt to equate the present case with *Sorrells v. United States*, 287 U.S. 435 (1932). The interpretation that we have given to §1341 produces neither the "absurd consequences" nor the "flagrant" injustice" that brought about the *Sorrells* entrapment doctrine. *Id.* at 446-52.

discussed the "use of the mails" requirement in connection with §1341 and stated:

> * * * To bring the scheme within the amibt of the mail fraud statute, the mails must be used for the purpose of executing the scheme, *Kann v. United States*, 323 U.S. 88, 93 (1944); must be employed before the scheme reaches fruition, *United States v. Maze*, 414 U.S. 395, 402 (1974); yet, need not be contemplated as an essential element of the scheme, *Pereira v. United States*, 347 U.S. 1, 8 (1954).

In the case before us, as in *United States v. Flaxman, supra* at 348-49, the fraud did not reach fruition until the tax forms were mailed to the state revenue authorities. This fact distinguishes the instant case from *United States v. Maze*, 414 U.S. 395 (1974), and brings apppellant's conduct in executing the fraud directly within the scope of §1341. *See United States v. Britton*, ____ F.2d ____ (8th Cir. 1974); *United States v. Miles*, ____ F.2d ____ (8th Cir. 1974); *United States v. Gaskill*, 491 F.2d 981, 984 (8th Cir. 1974).

Appellant's final contention is that the trial court erred in denying his motion to dismiss the indictment for selective and discriminatory prosecution. We disagree. The trial court conducted an evidentiary hearing during which appellant presented his evidence with respect to the motion. This included cross-examination of the prosecutor who voluntarily testified with respect to certain interrogatories propounded by appellant. Although appellant claims his questioning of the prosecutor was unduly circumscribed by the trial court, we find no abuse of discretion in this regard. *See United States v. Berrigan*, 482 F.2d 171, 179-82 (3d Cir. 1973). *Cf. United States v. Falk*, 479 F.2d 616,

619-24 (7th Cir. 1973). We are satisfied from an examination of the hearing record that the trial court was warranted in holding that there was insufficient evidence to support a finding of selective and discriminatory prosecution.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1367. **September Term, 1974**

The United States, Appellee,	)	Appeal from the United States District Court for the Western District of Missouri.
v.	)	
Jasper J. Mirabile, Appellant.	)	

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 7, 1974

SUPREME COURT

FEB 1 1975

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-689

JASPER J. MIRABILE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF SALVATORE A. CAPRA AMICUS CURIAE

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JASPER J. MIRABILE,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF SALVATORE A. CAPRA AMICUS CURIAE

INTEREST OF AMICUS[1]

The Petition for Certiorari before the Court involves an important question of conflict between state and federal law which has not been, but should be, settled by this Court, and which involves a decision of the Court of Appeals in conflict with applicable decisions of this Court.

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1. Letters of consent from the Petitioner and the Respondent to the filing of this brief have been filed with the Clerk of the Court.

Amicus also has a personal interest in this Petition for Certiorari because he has been indicted in the United States District Court for the Western District of Missouri, as was Petitioner Mirabile, for violation of the Mail Fraud Statute, Title 18, U.S.C., Section 1341, for allegedly mailing Missouri sales tax returns which fraudulently understated the amount of taxes due the State of Missouri.[2] His case is presently pending in the District Court as are indictments involving similar charges against three other Missouri citizens. It is possible that additional similar indictments may also be pending in the Western and Eastern Districts of Missouri and in other jurisdictions of which Amicus has no knowledge.

The Mail Fraud Statute has not heretofore been used to enforce either federal or state tax laws which mandate the use of the mails for filing tax returns and payment of taxes.

In overruling Petitioner Mirabile's motion to dismiss the indictment against him in the District Court, the Court said:

> "All parties and their counsel recognize that this case involves a novel question of application of the Mail Fraud Statute, and that appellate court guidance would be most helpful. All recognize the implications of this case have substantial national significance and are extremely important to the public as well as to these particular parties. Unfortunately, neither the United States Supreme Court nor any federal appellate court has yet addressed itself to the precise issues involved in this case." (*United States* v. *Mirabile*, 396 F.Supp. 1180, 1181)

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2. (*U. S.* v. *Capra*, 73-CR 208 W-2, 73-CR 209 W-3-2, U.S. District Court, Western District of Missouri, Western Division.)

On the same date United States District Judge William Collinson entered an order overruling a motion to dismiss the indictment filed against Amicus Capra, stating:[1]

> "The two Judges who have had these cases pending before them have conferred at length upon the merits of the motions to dismiss and have concurred fully, if reluctantly, in the conclusion. The motions to dismiss must be denied. Judge Hunter assumed the task of writing the original opinion and order denying the defendant's motion to dismiss in the *Mirabile* case, which was filed yesterday.
>
> For the reasons set out in detail in that opinion, which this Court adopts in full, the same order will have to be made in these cases.
>
> This Court is awed by the ramifications of an apparent policy of the Department of Justice of the United States to prosecute state tax offenders. Missouri taxpayers file state income tax returns, intangible tax returns, and assessment lists of personal property in addition to the sales tax returns of all merchants, which are involved in this case. The enforcement of the tax laws in this state is notoriously lax and slipshod at the state level, apparently because the legislature will not appropriate the money to employ sufficient personnel to even begin to adequately police the system. It is beyond the wildest flights of imagination to conceive that the mail fraud statute enacted by Congress was intended to place the burden and duty of enforcing state tax laws upon the Department of Justice of the United States and the federal judiciary. But, under all the existing precedents, this Court has to reluctantly conclude that we

would be legislating if we dismissed these indictments upon such policy considerations. It is therefore

ORDERED that the motion to dismiss the indictment in each of the above-styled cases is hereby denied."

The decision of the Court of Appeals that the Mail Fraud Statute "clearly applies to 'any scheme or artifice to defraud' in which the jurisdictional means (the mails) are employed" (Petition for Certiorari, p. 3a) is in conflict with the decision of this Court in *United States* v. *Maze*, 414 U.S. 395 (1974) and the decisions of this Court in *Kann* v. *United States*, 323 U.S. 88 (1944) and *Parr* v. *United States*, 363 U.S. 370 (1960) which hold that the federal mail fraud statute does not purport to reach all frauds involving use of the mails.

Because Missouri sales tax returns are required to be filed by mail the decision of the Court of Appeals is in conflict with the decision of the Court in *Parr* v. *United States*, 363 U.S. 370, 391 (1960) holding that mailings made or caused to be made under imperative command of duty imposed by state law are not criminal under the Mail Fraud Statute.

STATUTES INVOLVED[3]

Section 1341, Title 18, U.S.C.

Missouri Sales Tax Law, Chapter 144, Title 10, Revised Statutes of Missouri 1969

Section 144.080, R.S.Mo. 1969
Section 144.083, R.S.Mo. 1969
Section 144.100, R.S.Mo. 1969
Section 144.120, R.S.Mo. 1969
Section 144.270, R.S.Mo. 1969
Section 144.320, R.S.Mo. 1969
Section 144.330, R.S.Mo. 1969
Section 144.340, R.S.Mo. 1969
Section 144.350, R.S.Mo. 1969
Section 144.410, R.S.Mo. 1969
Section 144.480, R.S.Mo. 1969
Section 144.490, R.S.Mo. 1969
Section 144.500, R.S.Mo. 1969
Section 144.510, R.S.Mo. 1969

QUESTION PRESENTED

Whether the Use of the Mails, Required and Mandated by the Tax Laws of the State of Missouri, in the Filing of State Sales Tax Returns with the Missouri State Director of Revenue, Is in Violation of the Mail Fraud Statute, 18 U.S.C., Section 1341, When It Is Alleged That the Returns Are False and Fraudulent in Violation of the Missouri Sales Tax Law.

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3. Because of the length of the statutes involved, they are set forth verbatim in the Addendum to this brief.

REASONS FOR GRANTING THE WRIT

I.

Preliminary Statement

The Mail Fraud Statute, 18 U.S.C., Section 1341, was originally enacted by Congress in 1872. It cannot be said that Congress intended the proscriptions of the statute to apply to the use of the mails, required by law, in the filing of either state or federal tax returns, when neither the taxes nor the use of the mails in their assessment, collection and administrative systems were in existence, or even envisioned, at the time of the enactment of the statute.

West Virginia enacted the first comprehensive sales tax law in 1921. Today there are sales tax laws in effect in fifty states and the District of Columbia, which have become the chief single source of state tax revenue. In addition there are countless counties and cities throughout the nation which have sales tax laws.

A Missouri Sales Tax Law first became effective in 1934. Its provisions pertaining to assessment, collection, administration and enforcement are an exercise of its inherent sovereign power of taxation. The enforcement and penalty provisions of the Missouri Sales Tax Law in which violations are categorized as misdemeanors (Sec. 144.510) are an exercise of its power of taxation and not of its police power. The federal government has neither original nor concurrent jurisdiction of any kind over the enforcement of the tax laws of the State of Missouri.

It must be presumed that the Missouri Legislature was aware of the Mail Fraud Statute at the time it required its citizens to file sales tax returns and pay sales

taxes by mail, and that it did not intend, by so doing, to rely upon the federal government for enforcement of the sales tax law through mail fraud prosecutions. Otherwise, an impermissible taint of entrapment permeates a Missouri state tax law, the violation of which under state tax law is a simple misdemeanor, but which could become a federal felony only because of a compelled and mandated use of the mails in the filing and payment (intrastate) of sales tax returns and taxes.

The Supreme Court of Missouri has held that the provisions of Section 144.120 of the Missouri Sales Tax Law, which make the content of sales tax returns confidential, are intended to preserve the privacy of taxpayers and their affairs by prohibiting disclosure of such returns. *Director of Revenue* v. *State Auditor,* 511 SW2d 779, 783, 784 (1974). The Court held the state auditor was not entitled to access to individual tax returns in conducting his constitutional and statutory duties in auditing the office of the state department of revenue. The decision of the court extended to Missouri state income and intangible tax returns which are protected by confidentiality statutes similar to Section 144.120.

It is clear from the statute that it is the public policy of the state of Missouri that sales tax returns and their contents are not public records and are intended to be private and confidential between the state and the taxpayer. The returns may be used to enforce the sales tax law, but the only exception to their confidentiality is that information therefrom may be provided other state agencies, other states and the federal government which will aid in the collection of taxes or other revenue due or payable to them.

It is contrary to the declared public policy of the state of Missouri to permit sales tax returns or their contents to be used as the basis of a prosecution under a general criminal statute, of either the state of Missouri or of the federal government, such as the Mail Fraud Statute.

II.

The Mail Fraud Statute Was Enacted As a Consumer Protection Law, and Was Not Intended by Congress to Apply to the Use of Mails in Filing False or Fraudulent Tax Returns in an Attempt to Evade Payment of Federal or State Taxes.

In a recent case of first impression which received nationwide publicity, the United States District Court for the Southern District of New York held that the Mail Fraud Statute was not intended by Congress to apply to a scheme to defraud the United States in an attempt to evade payment of taxes.[4] In lieu of extended argument on this point we quote from Judge Weinfeld's opinion:[4]

> "The defendant contends that the mail fraud statute was not intended by Congress to apply to a scheme to defraud the United States in an attempt to evade the payment of taxes, which is the scheme charged in counts 1-3.[7] I am inclined to agree. Independent research by the court has failed to reveal a single instance of such a prosecution, and the government has not suggested any prior indictment under similar circumstances. Of course, 'the fact that there is no reported decision involving similar factual circumstances or legal theories is not determinative'[8] of the statute's

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4. *United States* v. *Lyle C. Henderson a/k/a "Skitch" Henderson*, No. S-74 CR 866, U.S.D.C., Southern District of New York, Edward Weinfeld, District Judge, Opinion filed November 6, 1974.

applicability. The basic question is whether the mail fraud statute was 'intended' by Congress to apply to the scheme set forth in counts 1-3."

Realistically, it is somewhat of a fiction to speak of whether Congress "intended" the mail fraud statute to apply to schemes to evade payment of federal income taxes. The predecessor to the present mail fraud statute was enacted in 1889,[9] almost twenty-five years before the adoption of the constitutional amendment authorizing the imposition of a federal income tax[10] and the passage of the predecessor of the present income tax laws.[11] Obviously there could have been no consideration in 1889 of the mail fraud statute with reference to laws enacted twenty-five years later under recently granted constitutional authority. However, such scant legislative history as there is indicates its general purpose. It was directed primarily at confidence men who engaged in schemes to sell counterfeit currency.[12] The bill as finally passed encompassed schemes to obtain money "by what is commonly called the 'sawdust swindle' or 'counterfeit money fraud' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' "papergoods,' 'spurious Treasury notes,' 'United States goods', 'green cigars' . . .[13]"

It is beyond peradventure that the thrust of the statute was to protect the public, more precisely, the gullible public, against the various fraudulent schemes that the cunning of the trickster could devise.[14] Over the years the public has been subjected to fraudulent schemes beyond those specifically referred to in the statute, and resourceful prosecutors have used the mail fraud statute effectively and properly against all those schemes. By 1949, the mail fraud statute

had been applied to so many innovative schemes to defraud that such terms as "sawdust swindle," "green articles," and "green cigars" were deleted as "the obsolete argot of the underworld," and the statute was streamlined as to its present form.[15]

As Mr. Chief Justice Burger recently observed, the mail fraud statute "has traditionally been used against fraudulent activity as a first line of defense. When a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."[16] The mail fraud provision encompasses schemes to defraud the "guileless members of the public with worthless securities, patent medicines, deeds to arid lands and inaccessible tracts of land, or other empty promises of instant wealth and happiness."[17]

The sweep of the statute is broad indeed, but the entire course of the statute's application has been to schemes of a different nature from the scheme alleged in this indictment. The use of the mail fraud provision has been generally confined to schemes of a type designed to defraud members of the community at large, in the sale of commodities and services, rather than schemes to defraud the government, as is involved in this case.[18] The court is of the view that the statute does not include within its proscription a scheme to defraud the Internal Revenue Service in the collection of income taxes. There is in such a case no need to use the mail fraud statute as a "stopgap device" until "particularized legislation" is enacted "to deal directly with the evil", for Congress has enacted legislation

that affords adequate protection of the public interest in the collection of income taxes.

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7. The government, in opposing the defendant's motion, suggests that the mail fraud counts of the indictment are also predicated on a scheme to defraud the University of Wisconsin; however, the indictment does not allege a scheme to defraud the University of Wisconsin or that the University was defrauded, nor does it indicate that the University, which received the musical scores as a gift, suffered any pecuniary or property injury. *See Hammerschmidt* v. *United States*, 265 U.S. 182, 188-89 (1924).

8. *Parr* v *United States*, 363 U.S. 370, 391 (1960).

9. Act of March 2, 1889, ch. 393, 25 Stat. 873.

10. U.S. Const. amend. XVI.

11. Act of Oct. 3, 1913, ch. 16, §2, 38 Stat. 166.

12. See H.R. Rep. No. 1501, 50th Cong., 1st Sess. (1888); S. Rep. No. 2566, 50th Cong., 2d Sess. (1889).

13. Act of March 2, 1889, ch. 393, §1, 25 Stat. 873.

14. See *Durland* v. *United States*, 161 U.S. 306, 314 (1896); *United States* v. *Owen*, 231 F.2d 831 (7th Cir.), cert. denied, 352 U.S. 843 (1956).

15. Reviser's Notes, 18 U.S.C. §1341, H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947).

16. *United States* v. *Maze*, 414 U.S. 395, 405-06 (1974) (Burger, J. dissenting).

17. Id. at 407-08.

18. The few cases in which schemes to defraud governmental units have been held to constitute schemes to defraud within the meaning of the mail fraud provision have involved the purchase or sale by the government of commodities or services. *See Bradford* v. *United States*, 129 F.2d 274 (5th Cir. 1942) (scheme to defraud a city by using political influence to induce the city to purchase buses at exorbitant prices); *Shushan* v. *United States*, 117 F.2d 110 (5th Cir. 1941) (scheme to secure a public contract on more favorable terms than otherwise available by bribing a public official); *Hartwell* v. *United States*, 107 F.2d 359 (5th Cir. 1939) (fraudulently overstating the purchase price of property, for the purpose of obtaining a loan for the purchaser and securing insurance of that loan by the Federal Housing Administration)."

Judge Weinfeld further reasoned that the Federal Internal Revenue Code covers all types of tax offenses and that it was the Congressional purpose to confine tax violations to the prohibitions and sanctions contained in the comprehensive Internal Revenue Code statutory scheme; that the use of the mail fraud statute, when based upon the same allegations as those required to sustain tax law violation charges, resulted in unpermissible pyramiding of sentences and fragmentizing of charges, when the Internal Revenue Code was designed to provide a suitable penalty for every violation of its provisions.

The Missouri Sales Tax Law generally provides that the violation of any of its provisions shall be a misdemeanor. (Sec. 144.510, V.A.M.S.) Specifically failure or refusal to make required returns (Sec. 144.480, V.A.M.S.) and the making of a false return or false statement in a return filed with the director of revenue (Sec. 144.490, V.A.M.S.) are misdemeanors. Fraud or evasion are also subject to a 25% penalty (Sec. 144.500, V.A.M.S.). A devastating penalty is provided for in Sec. 144.083 in the event of a default for a period of sixty days authorizes the director of revenue to revoke the taxpayers retail sales license, which renders the taxpayers state, county and city occupational and other licenses necessary to the conduct of a retail sales business of any kind, null and void.

Taxpayers are required to keep records of retail sales subject to inspection by the director of revenue by Sec. 144.320, V.A.M.S. The Director of Revenue is authorized hold investigations and hearings, with the power to subpoena witnesses and administer oaths (Sections 144.330 and .340). Failure of a witness to appear, to testify or to produce records is a misdemeanor (Sec. 144.350, V.A.M.S.).

The Missouri Sales Tax Law is a comprehensive legislative plan designed to assess, collect and administer a

sales tax for the purpose of producing revenue for the state. The Missouri legislature provided, as did the Congress in the Federal Internal Revenue Code, a penalty suitable to the degree of violation of the sanctions imposed by the Missouri Sales Tax Law.

It is submitted that neither the intent nor the provisions of the Mail Fraud Statute support its use to enforce federal or state tax laws which require and mandate the use of the mails in the filing of returns and payment of taxes.

III.

Mailings Made or Caused to Be Made Under the Imperative Command of Duty Imposed By State Law Are Not Criminal Under the Federal Mail Fraud Statute.

This Court in *Parr* v. *United States*, 363 U.S. 370, unequivocally held that mailings made or caused to be made under the imperative command of duty imposed by state law are not criminal under the federal mail fraud statute even where some of those who are so required to do the mailing plan to steal, when or after received, some indefinite part of the monies received in response to the mailings.

It is clear that under Missouri law the filing of sales tax returns by mail with the Director of Revenue is a mailing required to be made under imperative command of Missouri law, which is not criminal under the federal mail fraud statute.

Section 144.080, Revised Statutes of Missouri, requires persons coming under the provisions of the Missouri sales tax law to file a sales tax return and remit the amount of tax to the Director of Revenue with the return.

Section 144.100, Revised Statutes of Missouri, provides that the filing of the returns shall be in the manner as prescribed by the Director of Revenue. The returns are required to be filed on blank forms designed and furnished by the Director of Revenue. The sales tax return form furnished by the Director of Revenue clearly states that "Date of postmark will be prima facie evidence of date of payment. Do not send cash, or postage stamps. Make and send check, draft, or money order to: Department of Revenue, P.O. Box 840, Jefferson City, Missouri 65101."[5]

The one significant, basic and fundamental fact which distinguishes Petitioner Mirabile's case from all other mail fraud cases is that he was required by state law to *file* a sales tax return with the Department of Revenue, State of Missouri. Mirabile did not act voluntarily nor with any power of individual choice to file or not to file sales tax returns; Mirabile had a duty under state law to *file* sales tax returns.

The fact that Mirabile was compelled and obligated to file sales tax returns clearly brings his case within the exception to the mail fraud statute spelled out in *Parr*, that mailings made or caused to be made under the imperative command of duty imposed by state law are not criminal under the federal mail fraud statute.

A realistic interpretation of the Missouri State Sales Tax Law compels the conclusion that the sales tax returns are required by the law to be filed by mail at the office of the Director of Revenue in Jefferson City, Mo. It is the only approved manner of filing the return prescribed by the Director of Revenue under Sec. 144.100. The Director

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5. The Court may refer to the Petitioner's sales tax returns in evidence for corroboration of the mailing directions by the Missouri State Director of Revenue. The record may or may not show the self-addressed envelope forwarded by the Director with the blank sales tax return forms.

does not prescribe hand filing or filing in branch offices on the face of the return, but directs that the returns be filed by mail at the Jefferson City, Mo. office.

It must be conceded as a practical matter that it is possible to file sales tax returns and pay the tax to an agent of the Department of Revenue or to hand file the return and pay the tax at a District Office, as it is also possible to file and pay one's federal income tax at a District Office or to an agent of the IRS. The practice of personal filing and payment is in violation of the directives of the respective Directors of Revenue.

The *Parr* exception would still apply even if there was a genuine choice between two prescribed filing methods equally acceptable to the Director of Revenue, because the filing by mail would still be the performance of a duty mandated by state law and a mailing made or caused to be made because of a duty imposed by State law.

If the taxpayer actually had the power to select between two filing methods prescribed by the Director of Revenue, it could not be said that the taxpayer's choice of the mails for filing was not immaterial, collateral or incidental if fraud were involved in the return. In the latter instance the indictment would not state facts sufficient to state an offense under *U. S.* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *U. S.*, 363 U.S. 370, 392-393 (1960); *Kann* v. *U. S.*, 323 U.S. 88, because the mailing would not be essential to the execution of the fraud.

The fact that there is a possible alternative to filing returns by mail does not mean that a taxpayer has a genuine choice of filing methods, particularly when the personal filing of the returns is in violation of the method prescribed by the Director of Revenue under the authority vested in him by the legislature. The alternatives of personal filing and filing by mail do not present the taxpayer

with the act of selection between two equally prescribed and approved filing methods. Personal filing is a matter of expediency and convenience to the taxpayer, tolerated, but not prescribed by the Director of Revenue.

The Court of Appeals cited *Parr* only on the point that the fact that the underlying fraud may violate a state law does not exclude it from the proscription of the mail fraud statute (Pet. for Cert., p. 4a).

The Court of Appeals in affirming petitioners' conviction relied primarily upon its own opinion in *United States* v. *States,* 488 F.2d 761 (1973) as did the District Court in overruling petitioner's motion to dismiss for failure to state an offense. *United States* v. *Mirabile,* 396 F.Supp. 1180, 1184.

The first paragraph of the indictment against petitioner Mirabile alleged that he knowingly caused to be delivered by mail to the Missouri Department of Revenue "according to the directions thereon" envelopes containing State of Missouri Sale/Use Tax Returns, which returns subsequent numbered paragraphs of the indictment alleged understated the amount of the gross retail sales for the periods covered by the several returns. Some twenty-nine (29) of petitioner's sales tax returns were introduced into evidence, each of which contains prescription of the Director of Revenue to: "Make and send check, draft or money order to: Department of Revenue, P.O. Box 840, Jefferson City, Missouri 65101."

If Section 144.100, R.S. Mo. 1969 of the Missouri State Sales Tax Law was not in evidence before the Courts below, judicial notice should have been taken thereof, and of the statutory responsibility and authority of the Director of Revenue to prescribe the manner in which the sales tax returns shall be made and filed upon the blanks designed

and furnished by him. The statute leaves the taxpayer no discretion as to the manner, place or form of filing the sales tax returns required by the law; he must file his sales tax return when and where and in the manner prescribed by the Director of Revenue.

The District Court misinterpreted the Missouri sales tax law in holding that petitioner Mirabile "selected" the use of the mails to deliver the sales tax returns in question, and that the Missouri taxpayer is not required to mail in his sales tax return. *United States* v. *Mirabile* (*supra*, l.c. 1183). The Court made no reference to any section of the Missouri Sales Tax Law. Its ruling that the taxpayer is not required to mail in his sales tax return is not supported by any provision of the Sales Tax Law, and is contrary to the plain language and directions on the face of the returns to mail the returns to the Director of Revenue in Jefferson City, Missouri.[6]

In relying upon *United States* v. *States* (*supra*), both the Court of Appeals and the District Court overlooked the difference in the fact situations in the two cases. The state power of taxation cannot be equated with the election laws involved in *States*. The vital distinguishing fact in *Mirabile* which completely distinguishes his case from *States*, is that Mirabile used the mails to file his sales tax returns under command of a duty imposed by the law of the state of Missouri, a fact not remotely involved in the use of the mails in the absentee ballot fraud in *States*.

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6. In the District Court the government argued that the mailing of Missouri Sales Tax Returns was only permissive, because the Director of Revenue also accepted hand or personal filings. In so doing no reference was made to the Missouri sales tax law and the system established by the Statute nor to the directive on the face of the sales tax return blank that it be mailed to Jefferson City. (Government's Response to the Motions to Dismiss filed in the District Court November 28, 1973, R. .....)

Although the District Court in erroneously holding a Missouri taxpayer was not required to use the mails in filing his sales tax return in effect ruled that the legally mandated mailing rule in *Parr* did not apply to the fact situation in *Mirabile,* the Court of Appeals failed to consider the provisions of the Missouri Sales Tax Law applicable to the case as well as the filing directives on the actual returns. The result is a decision of the Court of Appeals which is in direct conflict with the decision of this Court in *Parr;* that mailings made or caused to be made under the imperative command of duty imposed by state law are not criminal under the federal mail fraud statute.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Certiorari a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Eighth Circuit. Denial of certiorari in this case will be construed as a mandate by federal law enforcement agencies to commence investigations and prosecutions involving the use of the mails in the filing of tax returns in every city, county, and state in the nation.

Respectfully submitted,

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ADDENDUM

Title 18, U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

§ 144.080, R.S.Mo. 1969. Seller responsible for tax—returns, when due—inability to collect no defense—penalty

1. Every person receiving any payment or consideration upon the sale of property or rendering of service, subject to the tax imposed by the provisions of sections 144.010 to 144.510, is exercising the taxable privilege of selling the property or rendering the service at retail and

is subject to the tax levied in section 144.020. He shall be responsible not only for the collection of the amount of the tax imposed on the sale or service to the extent possible under the provisions of section 144.285, but shall, on or before the thirtieth day of the month following each calendar quarterly period of three months, make a return to the director of revenue showing his gross receipts and the amount of tax levied in section 144.020 for the preceding quarter, and shall remit to the director of revenue, with the return, the taxes levied in section 144.020.

2. Where the aggregate amount levied and imposed upon a seller by section 144.020 is in excess of two hundred and fifty dollars for either the first or second month of a calendar quarter, the seller shall pay such aggregate amount for such months to the director of revenue by the fifteenth day of the succeeding month. The amount so paid shall be allowed as a credit against the liability shown on the seller's quarterly return required by this section.

3. Where the aggregate amount levied and imposed upon a seller by section 144.020 is less than forty-five dollars in a calendar quarter, the director of revenue shall by regulation permit the seller to file a return for a calendar year. The return shall be filed and the taxes paid on or before January thirty-first of the succeeding year.

4. The seller of any property or person rendering any service, subject to the tax imposed by sections 144.010 to 144.510, shall collect the tax from the purchaser of such property or the recipient of the service to the extent possible under the provision of section 144.285, but his inability to collect any part or all of the tax does not relieve him of the obligation to pay to the state the tax imposed by section 144.020; except that the collection of the tax imposed by sections 144.010 to 144.510 on motor

vehicles and trailers shall be made as provided in sections 144.070 and 144.440.

5. It shall be unlawful for any person to advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof imposed by sections 144.010 to 144.510, and required to be collected by him, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Amended by Laws 1963, p. 198, § 1; Laws 1965, p. 261, § 1; Laws 1969, p. 255, § 1, effective Jan. 1, 1970.

§ 144.083, R.S.Mo. 1969. Retail sales license required for all collectors of tax—prerequisite to issuance of city or county occupation license

1. The director of revenue shall require all persons who are responsible for the collection of taxes under the provisions of section 144.080 to procure a retail sales license at no cost to the licensee which shall be prominently displayed at his place of business, and the license is valid until revoked by the director or surrendered by the person to whom issued when sales are discontinued. All persons beginning business subsequent to the effective date of this section and section 144.087 and who are required to collect the sales tax shall secure a retail sales license prior to making sales at retail. Such license may, after ten days' notice, be revoked by the director of revenue only in the event the licensee shall be in default for a period

of sixty days in the payment of any taxes levied under section 144.020.

2. The possession of a retail sales license shall be a prerequisite to the issuance of any city or county occupation license or any state license which is required for conducting any business where goods are sold at retail. The revocation of a retailer's license by the director shall render the occupational license or the state license null and void. Laws 1961, p. 629, § 1, as amended Laws 1965, p. 261, § 1.

§ 144.100, R.S.Mo. 1969. Returns filed with director —charge and time sales— correction of errors

1. Every person making any taxable sales of property or service, except transactions provided for in sections 144.070 and 144.440, individually or by duly authorized officer or agent, shall make and file a written return with the director of revenue in such manner as he may prescribe.

2. The returns shall be on blanks designed and furnished by the director of revenue and shall be filed at the times provided in sections 144.080 and 144.090. The returns shall show the amount of gross receipts from sales of taxable property and services by the person and the amount of tax due thereon by said person during and for the period covered by the return. With each return, the person shall remit to the director of revenue the amount of the tax due.

3. In case of charge and time sales the amount thereof shall be included as sales in the returns as and when payments are received by the person, without any deduction therefrom whatsoever.

4. If an error or omission is discovered in a return or a change be necessary to show the true facts, the error may be corrected, the omission supplied, or the change made in the return next filed with the director, as prescribed by law.

5. The amount of gross receipts from sales and the amount of tax due returned by the person, as well as all matters contained in the return, is subject to review and revision in the manner herein provided for the correction of the returns. As amended Laws 1957, p. 803, § 1; Laws 1965, p. 261, § 1.

§ 144.120, R.S.Mo. 1969. Content of returns, confidential

1. It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person or persons any information relative to, or the contents of, any return filed under this chapter, or to permit any other person or persons not connected with his office to see, inspect or examine the same; and it shall be unlawful for any person or officer to use any return filed under this chapter in any manner whatever in connection with or for the purpose of assessing property tax or determining the amount of property assessment of any person or corporation, or to use the same in any way in making up any property assessment roll.

2. It shall be unlawful for the director of revenue, or his deputy, agent or clerk to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this chapter, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor; provided, however, that this section shall not prohibit the director of revenue nor any agent,

clerk or inspector from giving evidence in court in any proceeding brought to collect any tax due hereunder, or to punish any person for the making of false or fraudulent returns or providing other state agencies, other states or the federal government with information which will aid in the collection of taxes or other revenue due or payable the state of Missouri, another state or the federal government. As amended Laws 1961, p. 630, § 1.

§ 144.270, R.S.Mo. 1969. Director to make rules and regulations

For the purpose of more efficiently securing the payment of and accounting for the tax imposed by sections 144.010 to 144.510, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of sections 144.010 to 144.510. As amended Laws 1955, p. 829, § 1; Laws 1961, p. 633, § 1.

§ 144.320, R.S.Mo. 1969. Keep records of retail sales —open to inspection by director

Every person engaged in the businesses herein described in this state shall keep records and books of his gross daily sales, together with invoices, bills of lading, sales records, copies of bills of sale and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the director of revenue or his duly authorized agents and employees. Such books and records shall be preserved for a period of at least two years, unless the director of revenue, in writing, authorized their destruction or disposal at any earlier date. (R.S.1939, § 11421, A.L.1941, p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.330, R.S.Mo. 1969. Examination of records—investigations

For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person, the director of revenue or any employee of the director of revenue designated in writing by the director of revenue, may hold investigations and hearings concerning any matters covered by this chapter, and may examine any books, papers, records or memoranda bearing upon such sales by any such person and may require within the county where the person resides or does business the attendance of such person or any officer or employee of such person, or of any person having knowledge of such sales, and may take testimony and require proof for his information. In the conduct of any investigation or hearing, neither the director of revenue nor any employee thereof, shall be bound by the technical rules of evidence and no informality in any proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made or approved or confirmed by the director of revenue. The director of revenue or any employee thereof, holding such investigation shall have power to administer oaths to such person or witnesses. (R.S.1939, § 11422, A.L.1941 p. 698, A.L.1943 p. 1012, A.L. 1945 p. 1865)

§ 144.340, R.S.Mo. 1969. Exemption from testifying —immunity from prosecution

No person shall be excused from testifying or from producing any books, papers, records or memoranda in any investigation or upon any hearing, when ordered to do so by the director of revenue or any employee of the director of revenue, upon the ground that the testimony or evidence, documentary or otherwise, may tend

to incriminate him or subject him to a criminal penalty, but no person shall be prosecuted or subjected to any criminal penalty for or on account of, any transaction made or thing concerning which he may testify or produce evidence, documentary or otherwise, before the director of revenue or employee of the director of revenue; provided, that such immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. (R.S.1939, § 11452, A.L.1941 p. 698, A.L. 1943 p. 1012, A.L.1945 p. 1865)

§ 144.350, R.S.Mo. 1969. Penalty for failure to testify

If any person summoned as a witness by the director of revenue or such employee of the director of revenue shall fail to obey such summons or shall refuse to testify or answer any material question or shall refuse to produce any book, record, paper or other data when required so to do, he shall be deemed guilty of a misdemeanor and punished as provided by law. (R.S.1939, § 11423, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.410, R.S.Mo. 1969. Remedies of state, cumulative

It is expressly provided that the foregoing remedies of the state shall be cumulative, and that no action taken by the director of revenue or the attorney general shall be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this chapter. (R.S.1939, § 11439, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.480, R.S.Mo. 1969. Failure to furnish return a misdemeanor

Any person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data reasonably required by the director of revenue shall be deemed guilty of a misdemeanor. (R.S.1939, § 11442, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.490, R.S.Mo. 1969. Penalty for false return

Any person who willfully makes a false return, or who willfully makes a false statement in any return under oath or otherwise filed with or transmitted to the director of revenue relating to the amount of any sales or tax due under this chapter, shall be deemed guilty of a misdemeanor. (R.S.1939, § 11443, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.500, R.S.Mo. 1969. Penalty for fraud or evasion

If fraud or evasion on the part of a person is discovered by the director of revenue, he shall determine the amount of which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent thereof, and shall assess the same against the person. The amount so assessed shall be immediately due and payable; provided, however, that the director of revenue shall promptly thereafter give to said person written notice of such assessment and penalty, which notice shall be served personally on such person, or by registered mail. Such person shall have the right to petition for hearing of such assessment, as is provided herein. (R.S.1939, § 11433, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

§ 144.510, R.S.Mo. 1969. Violation of this law a misdemeanor

Any person, officer, agent or employee of any firm, corporation, association, joint adventure, estate, trust, receiver or syndicate violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and, where punishment is not otherwise provided for herein, shall be punished for such. (R.S.1939, § 11444, A.L.1941 p. 698, A.L.1943 p. 1012, A.L.1945 p. 1865)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-689

JASPER J. MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the applicability of the federal mail fraud statute to his scheme to defraud the State of Missouri by submitting false sales tax returns by mail. He also alleges that the trial court erred in denying his motion to dismiss the indictment on the ground of impermissibly selective prosecution of him because of his Italian ancestry and his association with persons thought to be involved in criminal activity.

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on a one-count indictment charging mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a term of five years' probation. The court of appeals affirmed (Pet. App. A).

1. In 1969, petitioner employed Bill Henn, an accountant, to prepare monthly operating statements, payrolls, and state sales tax returns for a restaurant owned and operated by petitioner in Kansas City, Missouri (2 Tr. 3-5, 38, 137, 141).[1] Prior to the due date for the sales tax return, Henn reported the gross sales and state tax liability to petitioner. He also told petitioner that his review of prior sales tax returns showed that there had been a discrepancy in the reporting of the actual gross sales (2 Tr. 2, 8, 10). Petitioner specified to Henn an amount he intended to pay, which was less than 50 percent of the actual amount due (2 Tr. 11, 14-15). Henn then calculated a gross sales figure that would produce a tax liability in the amount petitioner had specified he was willing to pay (2 Tr. 13). Henn continued to prepare the sales tax returns in the same manner through November 1970 (2 Tr. 15).

Between late November 1970 and November 1971, petitioner employed James Martin to replace Henn (2 Tr. 40-47). During this period, petitioner asked Martin to give him a gross sales tax figure representing the amount petitioner was willing to pay—an amount considerably lower than the tax due on the actual gross sales (2 Tr. 43-45).

In November 1971, petitioner hired William Mangold to replace Martin (2 Tr. 70). Three or four months later, Mangold told petitioner of the discrepancy between the figures appearing on prior state tax returns and the prior actual gross sales figures (2 Tr. 72-73). From December 1971 or January 1972 through April 1972, petitioner gave Mangold the lower sales tax to be paid, on the basis of which Mangold computed the reported gross sales (2 Tr. 73-76).

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[1] "1 Tr." and "2 Tr." refer, respectively, to the transcripts of the proceedings on the motion to dismiss and of the trial.

2. In response to petitioner's motion to dismiss alleging improperly selective prosecution, the trial court invited the government to answer voluntarily seven of nine questions submitted by petitioner: (1) what the law enforcement considerations were for prosecuting petitioner; (2) whether anyone on the staff caused petitioner to be placed upon a list of organized crime subjects, and if so, (a) when this was done, (b) to whom was the information communicated and (c) which federal agencies supplied the Strike Force with information; (3) how the Strike Force became aware that petitioner was searched by border authorities in May 1972; (4) under what grant of authority the Strike Force operates in the Western District of Missouri; (5) whether authorization was given for any physical or electronic surveillance of petitioner after January 1, 1969; (6) when the Strike Force office first suspected petitioner of the tax violations; and (7) whether petitioner's counsel had been a subject of electronic or physical surveillance since January 1969 (1 Tr. 89-90, 96, 101, 103, 105). The court did not request answers to questions about the nature of specific evidence identifying petitioner as a person involved with organized crime and about the content of petitioner's statement to prosecutor De Feo when petitioner's wife appeared before the grand jury.

De Feo then testified that petitioner was prosecuted because of the quantum of proof available to establish the offense charged, the potential deterrent effect of the prosecution, and the probability of conviction (1 Tr. 122). He further testified that the federal agencies involved were the Federal Bureau of Investigation and the Internal Revenue Service; that petitioner had told De Feo that his wife should not have been subpoenaed to

appear before the grand jury; that the Strike Force derived its authority from 28 U.S.C. 515; that De Feo had no knowledge of electronic surveillance since January 1, 1969, of petitioner, his family or his attorney; and that petitioner was first suspected of underpaying his state tax in May 1973 (1 Tr. 122-124).

When asked on cross-examination whether he caused petitioner's name to be placed on an organized crime list, De Feo testified that petitioner was the subject of an anti-racketeering and gambling investigation in the early part of 1960 by the Federal Bureau of Investigation and had been investigated in mid-1960 by the Internal Revenue Service as an organized crime subject (1 Tr. 135-136). He further testified that as a result of a recompilation of a 1962 list of organized crime subjects prepared by the Attorney General, petitioner was designated as an organized crime subject. De Feo also testified that it was not until the end of 1972 that the Internal Revenue Service requested information about petitioner. Thereafter, in February 1973, the government directed a subpoena to the Missouri Department of Revenue to secure the tax returns of approximately 200 businesses believed to have "hoodlum" connections, including petitioner's restaurant. In May 1973 the Strike Force received information indicating that petitioner had underpaid his state taxes (1 Tr. 137). De Feo also testified that the assumption made by petitioner's counsel that only three Italians from a group of 2,000 possible violators of the state sales tax laws were prosecuted was erroneous and that petitioner was selected because he underreported $28,000—one of the largest amounts discovered by the Strike Force (1 Tr. 148-149). De Feo also denied petitioner's claim that he offered to drop the indictment in exchange for petitioner's cooperation (1 Tr. 149-150).

The court denied the motion to dismiss, stating that "the evidence in this case does not show that type or any type of illegal selective and discriminatory prosecution which would form the basis, or could form the basis, for a proper dismissal of the indictment" (1 Tr. 153).

3. Petitioner stipulated that of the restaurant's gross sales of $1,636,000, only $678,000 was reported; that of the tax liability of approximately $48,000, only about $20,000 was paid from January 1, 1970, through April 30, 1972; and that all of the tax returns and checks submitted to the Department of Revenue were signed by petitioner and mailed to the Department of Revenue (2 Tr. 38-39, 64-65, 113-114, 260-262).

4. Petitioner's contention that the mail fraud statute was improperly applied to his scheme to defaud the State of Missouri by submitting false tax returns by mail, because that scheme did not involve a federal injury and the mailing bore no relationship to the scheme, was properly rejected by the court of appeals. We rely upon the opinion of the court of appeals (Pet. App. 2a-6a) and upon our memorandum in opposition to the petition for a writ of certiorari to review the decision in *United States* v. *Flaxman*, 495 F. 2d 344 (C.A. 7), certiorari denied, No. 73-1894, November 25, 1974,[2] which presented the same question.[3]

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[2]We are sending petitioner's counsel a copy of our memorandum.

[3]Unlike the *amicus*, petitioner does not contend that he was obliged under state law to file the sales tax returns by mail. To the contrary, petitioner regards the mails as but one of the possible means of filing the returns, the selection of which should be inconsequential (Pet. 10). Accordingly, *amicus*' claim of a conflict with *Parr* v. *United States*, 363 U.S. 370, is unfounded.

The decision of the district court in *United States* v. *Henderson*, No. S-74 Cr. 866 (S.D. N.Y.), decided November 6, 1974, also relied on by *amicus*, is distinguishable because it involved the use of the mails in filing federal tax returns and required the court to construe the intent of Congress as reflected in two different acts of Congress. In any event, we contend that that case was wrongly decided.

5. In rejecting petitioner's claim of discriminatory prosecution, the courts below properly applied established principles. It is settled that a wrongdoer cannot escape prosecution and conviction simply because other offenders are not prosecuted. See, *e.g.*, *United States* v. *Malinowski*, 472 F. 2d 850, 860 (C.A. 3), certiorari denied, 411 U.S. 970; *Washington* v. *United States*, 401 F. 2d 915, 925 (C.A.D.C.); *Moss* v. *Hornig*, 314 F. 2d 89, 92-93 (C.A. 2). As this Court stated in *Oyler* v. *Boles*, 368 U.S. 448, 456, "selective enforcement" is not itself forbidden; rather, the exercise of prosecutorial discretion is subject to challenge only upon proof that selection of a particular defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[4]

Even if petitioner's allegations could be regarded as a sufficient showing of improper motivation to justify dismissal, that claim was properly rejected here. After hearing the prosecutor's testimony, which showed, among other things, that petitioner's fraudulent underpayments were among the target uncovered by the investigation, the district court concluded that petitioner was not selected for prosecution for the reasons alleged by

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[4]Some courts have recognized this defense where a defendant has shown that he was singled out for prosecution because of his exercise of rights protected by the First Amendment. See *United States* v. *Falk*, 479 F. 2d 616 (C.A. 7) (*en banc*); *United States* v. *Steele*, 461 F. 2d 1148, 1150-1152 (C.A. 9). No such factor is present here.

petitioner. That essentially factual determination was sustained by the court of appeals, and further review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.